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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 270

EDYTHE C. UROW, Administratrix of the Estate of Louis Urow, deceased, *Petitioner*,

v.

DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner, Edythe C. Urow, Administratrix of the Estate of Louis Urow, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the District Court for the District of Columbia dismissing petitioner's complaint for damages for wrongful death.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Appendix *infra*, p. 1a-6a, R. 8-13) are reported at 316 F. 2d 107. Petition for rehearing *en banc* was denied without opinion but with an order (Appendix, p. 8a, R. 28) noting that Chief Judge Bazelon and Circuit Judges Fahy and Wright would grant the petition. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered February 7, 1963 (Appendix p. 7a, R. 14), and a timely petition for rehearing *en banc* was denied by order filed April 16, 1963 (Appendix, p. 8a, R. 28). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner's decedent was killed on the streets of Washington because of the absence of control devices at an intersection known to be heavily trafficked and dangerous. The question presented is: Whether the rule long established by this Court that the District of Columbia is civilly liable for its failure to maintain the safety of its streets is applicable to cases where lack of street safety is occasioned by absence of obviously required controls rather than by barriers or holes?

STATEMENT

On January 27, 1960, petitioner's decedent, a practicing attorney in the District of Columbia, while crossing in an unmarked crosswalk, was struck and killed by an automobile on heavily trafficked Connecticut Avenue, at its then uncontrolled Brandywine Street intersection. Jurisdiction of the case was lodged with the United States District Court for the District of Columbia under Title 11 District of Columbia Code § 306 (1961 ed.) A detailed complaint for his wrongful death (R. 2) charged that respondent,

with notice that the intersection was heavily trafficked and dangerous, was negligent and causally responsible in failing to maintain the street in a reasonably safe condition for pedestrains by appropriate markings and traffic control devices.

Respondent's motion to dismiss, asserting that "The planning and maintenance of a traffic control system is a governmental function for which [it] is not liable as a matter of law" (R. 6), was granted by the trial court (R. 6) and that action was affirmed by the court below (R. 14) in a *per curiam* opinion (Appendix, p. 1a, R. 8) from which Judge Wright dissented (Appendix, p. 5a, R. 11).

The majority below, quoting this Court's opinion in *Johnston* v. *District of Columbia*, 118 U.S. 18, 20-21 (1886) to the effect that the adoption of a general plan of drainage involves the exercise of deliberate judgment and discretion of a *quasi* judicial nature not subject to revision by a court or jury (Appendix, p. 3a, R. 9), concluded that "Pursuant to the legislative authority the Commissioners have designated certain intersections for the installation of traffic control signals and have provided the hours during the day and night such signals shall operate. The establishment of such a general traffic control plan is essentially legislative in character and is the result of the Commissioners' exercise of discretion and judgment," and that, therefore, "Whatever defects there may be in the doctrine of municipal immunity from tort liability, the doctrine is sound in this context." (Appendix, p. 2a, R. 9). Petitioner's contention that liability flowed from established municipal responsibility for keeping streets in a safe condition was brushed aside on the asserted basis that "The cases relied upon . . . to support her 'street safety' contention all involved physical defects, obstructions or failure to maintain proper lighting" and, therefore, involved a ministerial as distinguished from a discretionary function (Appendix, p. 4a, R. 11).

Dissenting, Judge Wright noted that the doctrine of sovereign immunity ". . . is a creature of the courts [and] it would seem, therefore, that the courts . . . may undertake to relieve the district of this albatross." But, said Judge Wright, that issue was not presented because the District's responsibility for street safety has always been recognized and "whether this absence [of a traffic control device alleged in the complaint to have caused the street to be unsafe] stemmed from an exercise of informed judgment on the part of the District Government or resulted from negligence is a question of fact which, if controverted, is for the jury." (Appendix, p. 6a, R. 13).

A petition for rehearing *en banc* was denied by order noting that Chief Judge Bazelon and Judges Fahy and Wright, the first two of whom did not sit on the deciding panel, would have granted that petition. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH ESTABLISHED LAW AND DECISIONS OF THIS COURT HOLDING THE DISTRICT RESPONSIBLE FOR THE SAFETY OF ITS STREETS

A. The District's Liability for Negligent Failure to Keep Its Streets Safe Antedates Johnston v. District of Columbia Relied Upon Below

Even before *Johnston* v. *District of Columbia*, *supra*, relied upon by the majority below, this Court had firmly established the corporate responsibility of the District for the maintenance of the safety of its streets and its civil liability for breach of that responsibility. *Barnes* v. *District of Columbia*, 91 U.S. 540 (1875); *Weightman* v. *Washington*, 1 Black (66 U.S.) 39 (1861). And when the District's government was altered to its present form, that responsibility was reaffirmed. *District of Columbia* v. *Woodbury*, 136 U.S. 472 (1890).

In a sense anticipating the circumstances later met in *Johnston* v. *District of Columbia, supra,* this Court said in *Weightman:*

> "Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charter. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. But the duties arising under such grants are necessary undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly defined duty is enjoined in consideration of the privileges and immunities which the Act of Incorporation confers and secures. Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation; or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance." 1 Black (66 U.S.) at 49-50.

The Court then concluded that the District's failure to maintain its streets in a safe condition for traffic consti-

tuted an actionable breach. That has been the law down to the current time [see, e.g., *District of Columbia* v. *Caton*, 48 App. D.C. 96, 106 (1918) and *Booth* v. *District of Columbia*, 241 F. 2d 437, 439 (1956)], unless the decision below is now to be left standing as a qualification of and limitation upon the doctrine of *Weightman*, *Barnes*, and *Woodbury* as enunciated by this Court.

B. The Decision in Johnston Did Not Alter or Limit the District's Responsibility for the Safety of Its Streets

As noted, this Court in effect anticipated the problem presented by *Johnston* when it earlier decided *Weightman*. It is significant that in deciding *Johnston* the Court adverted to its prior decisions in *Weightman* and *Barnes* which were then distinguished on the sole ground that in *Johnston* there was no issue involved as to the duty of the District to maintain the safety of its streets (118 U.S. at 21) on account of the breach of which, *Weightman* and *Barnes* taught that the District could be held civilly liable.

C. And Neither Fact Nor Logic Warrants That Established Municipal Responsibility for Street Safety Should, By Reference to the Zone of Immunity Delineated in Johnston, Be Considered Any the Less Because Traffic Safety Devices Are Involved Rather Than Holes, Impediments, or Faulty Design

Understanding that under our system of jurisprudence a decision settles no more than the impact of the actual facts presented, it becomes clear that what was considered in *Johnston* supplies no factual or logical basis for the departure below from standards of municipal responsibility to a sanctuary of official irresponsibility.

In *Johnston* the issue involved the original master plan and design for a sewer system for the District conceived and developed at the highest levels of government and "depending upon considerations affecting the public health and general convenience throughout an extensive terri-

tory." (118 U.S. at 20). Thus, factually, *Johnston* involved complex and integrated overall community planning necessarily to be protected from litigated second guessing.

The establishment of an overall general traffic control plan and system may similarly be legislative in character, particularly when, as in *Dalehite* v. *United States*, 346 U.S. 15 (1953) and in *United States* v. *Union Trust Company*, 221 F. 2d 62 *affirmed* 350 U.S. 907 (1955), the plan is conceived and designed at the higher echelon executive level "where there is room for policy judgment and decision" (346 U.S. at 35-36). But mere words cannot equate a decision to have such an overall control system and to establish its pattern with a series of isolated and episodic lower level determinations (or negligent failures to determine), to place a traffic light or other control device or to mark a crosswalk at a particularly dangerous traffic intersection.

Policy and discretion may enter into the question whether to plan or control and in general how, but it does not enter into the episodic mechanical applications of that plan. Indeed to elevate such minutiae of expanding government to the level of the policy maker or the legislator is to belittle the legislative function for which more trying and soul searching problems must be available. Moreover, as noted by the dissent below (Appendix, p. 6a, R. 13), at the least, whether such aptitudes, wisdom, and invulnerable acts of discretion are involved each time need dictates the installation of a single traffic control device should meet the scrutiny of the fact finder, whether judge or jury. Acting under controlling law it is for that fact finder to determine whether the act or omission of the municipality was that of the so-called ministerial level or of the policy or legislative level of command.

Perhaps the difficulty with the view of the majority below that, as in *Johnston*, the situation here involves a

protected exercise of legislative discretion, not mechanical ministerial application subject to ordinary tests of negligence applied by the fact finder, can be illustrated by certain extremes. Suppose in this day and age when the use of signs reading "Railroad Crossing" is almost universal and the need obvious, the Highway Department of the District of Columbia failed to install such signs at a particular grade crossing. Or suppose at a particular uncontrolled intersection, a record of one fatality per day for one year was a fact known to the Highway Department. Would it still be suggested that the determination or lack of determination to install proper signs or controls are acts committed to the discretion and judgment of the policy maker and legislative in nature so as to be immune from review in civil litigation, as with the overall plan considered in *Johnston*, or are these, as here, just other facets of the city's unshirkable duty to keep its streets safe for the users?

Practical considerations require the obvious answer. The pedestrain killed because of a dangerous heavily trafficked intersection lacking controls is just as dead as if he died from a fall into a hole in the street or because an automobile hit a hole and careened into him. The degree of consideration, care and judgment involved in determining whether a street is in need of repair is no different qualitatively or quantitatively from that involved in placement of control signals.

Finally, there is no basis for the purported distinction below of the line of street safety cases and, accordingly, no basis for excluding their application in favor of the sheltered immunity of *Johnston*. It is true all, including this Court's decisions in *Weightman*, *Barnes*, and *Woodbury*, "involved physical defects, obstructions or failure

to maintain proper lighting" (Appendix, p. 4a, R. 11). In none, however, was the nature of or responsibility for the basic source of difficulty considered relevant, the only issue being whether in fact an unsafe street condition was thereby created with respect to which there was negligent omission by the District to act in fulfillment of its "paramount duty . . . of maintaining the streets in a reasonably safe condition" (*District of Columbia* v. *Caton*, 48 App. D.C. 96, 106 (1918); *Booth* v. *District of Columbia*, 241 F. 2d 437, 439 (1956)). Thus, even in *Caton* the court below recognized that "The action is not for negligence because of a defective plan, but for maintaining the streets in an unsafe condition." (48 App. D.C. at 107).

Even were the existence of physical defects the point of reference, such physical defects exist here as much as in the earlier street safety cases (defective railway tracks in *Caton*, overflow from an inadequate sewer causing flooding in *Booth*, a defective bridge in *Weightman*, a hole in the road in *Barnes* and *Woodbury*). The absence of safety devices for pedestrians and drivers—the control lights or stop signs or crosswalk markers—is just as real a physical fact, even though a negative one, as a barrier or a hole. The physical impact upon a pedestrian of an avalanche of cars because of the absence of a control device as here is no less real or physical than the impact of an avalanche of water because of inadequate controls or capacity in a sewer system as in *Booth*. Certainly, the danger to the user of the street from an avalanche of cars caused by absence of controls is as foreseeable and predictable as the danger from an avalanche of water caused by an improper sewer system.

Thus the distinction seized upon below to warrant departure from the classic street safety cases is not only unprecedented but unreal. Even if it be urged that anticipation and resolution of the need for controls at a particular traffic intersection involves nice considerations of expertise,

certainly the same was no less true in *Booth* with respect to sewers and may be equally true with respect to the maintenance of bridges as in *Weightman*. Neither of the situations considered in those cases presented engineering or planning factors any less complex than as below, so that in all the issue of negligence should be as susceptible of proof or defense as in any other case.

II. THE DECISION BELOW CONSTITUTES AN UNWARRANTED ENLARGEMENT OF IMMUNIZED OFFICIAL IRRESPONSIBILITY

This is the day when, as noted in the dissent below, sovereign immunity "has been the subject of a crescendo of criticism" (Appendix, p. 5a, R. 12 fn. 4) and has been judicially abolished in whole or part by many of the states (Appendix, p. 5a, R. 11 fn. 3). The federal government has legislated out of existence its own immunity except in special instances or where a "discretionary function" is involved, a limitation which itself is becoming more and more narrowly construed. The trend of expanding government and the recognition of the desirability of levelling or spreading the costs of accidents, rather than having them fall solely on the shoulders of the unfortunate victims (*cf. Rayonier Incorporated* v. *United States*, 352 U.S. 315, 320 (1957)), has naturally led to a drastic but necessary curtailment of the historical anomaly of sovereign immunity. In short we have come to recognize that large government must be responsible government.

The decision below, therefore, we respectfully suggest is back-sliding. By logical and conceptual abuse of an exception to an established rule of governmental responsibility, an exception necessary to safeguard true executive and legislative discretion, it would enlarge the haven of official irresponsibility to include areas which this Court has long held to be subject to correction by civil process. That no such limitation of municipal responsibility for street safety is cognizable within the orbit of this Court's prior decisions or the tide of history, must now be determined.

CONCLUSION

For the reasons noted, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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